Supreme Court of the United States

OCTOBER TERM, 1947

No. 87

ORSEL McGHEE and MINNIE S. McGHEE, his wife,
Petitioners,

vs.

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, *et al.*,
Respondents.

BRIEF FOR PETITIONERS AS AMICUS CURIAE

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BRIEF FOR PETITIONERS AS AMICUS CURIAE

I

Statement

Pursuant to Rule 27 of the General Rules of this Court, this brief is presented amicus curiae; certiorari in this case having been granted by this Court on June 23, 1947 (91 Lawyers' Ed. 1606).

Amicus, the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc. is an organization which operates throughout the United States to combat racial and religious discrimination and oppression.

For about fifteen years, the League has continuously maintained economic and legal research departments through which it has, among other things, developed the information with which it has applied to the courts and other agencies of our government to secure for our citizenry equality of treatment before the law, irrespective of race, color or creed.

The President's Committee on Civil Rights has made specific recommendations (New York Times, October 30, 1947, p. 14, et. seq.) for the execution of a program of action, containing the following important observations:

"THE TIME IS NOW

Twice before in American history the nation has found it necessary to review the state of its civil rights. The first time was during the fifteen years between 1776 and 1791, from the drafting of the Declaration of Independence through the Articles of Confederation experiment to the writing of the Constitution and the Bill of Rights. It was then that the distinctively American heritage was finally distilled from earlier views of liberty. The second time was when the Union was temporarily sundered over the question of whether it could exist "half-slave" and "half-free."

It is our profound conviction that we have come to a time for a third re-examination of the situation, and a sustained drive ahead. Our reasons for believing this are those of conscience, of self-interest, and of survival in a threatening world. Or to put it another way, we have a moral reason, an economic reason, and an international reason for believing that the time for action is now.

. . . . . .

THE INTERNATIONAL REASON

Our position in the postwar world is so vital to the future that our smallest actions have far-reaching effects. We have come to know that our own security in a highly interdependent world is inextricably tied to the security and well-being of all people and all countries. Our foreign policy is designed to make the United States an enormous, positive influence for peace and progress throughout the world. We have tried to let nothing, not even extreme political differences between ourselves and foreign nations, stand in the way of this goal. But our domestic civil rights shortcomings are a serious obstacle.

In a letter to the Fair Employment Practice Committee on May 8, 1946, the Honorable Dean Acheson, then Acting Secretary of State, stated that:

> * * * the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over the way of minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed.
>
> I think it is quite obvious * * * that the existence of discriminations against minority groups in the United States is a handicap in our relations with other countries. The Department of State, therefore, has good reason to hope for the continued and increased effectiveness of public and private efforts to do away with these discriminations.

The people of the United States stem from many lands. Other nations and their citizens are naturally intrigued by what has happened to their American "relatives." Discrimination against, or mistreatment of, any racial, religious or national group in the United States is not only seen as our internal problem. The dignity of a country, a continent, or even a major portion of the world's population, may be outraged by it. A relatively few individuals here may be identified with millions of people elsewhere, and the way in which they are treated may have world-wide repercussions. We have fewer than half a million American Indians; there are 30 million

more in the Western Hemisphere. Our Mexican American and Hispano groups are not large; millions in Central and South America consider them kin. We number our citizens of Oriental descent in the hundreds of thousands; their counterparts overseas are numbered in hundreds of millions. Throughout the Pacific, Latin America, Africa, the Near, Middle, and Far East, the treatment which our Negroes receive is taken as a reflection of our attitudes toward all dark-skinned peoples.

In the recent war, citizens of a dozen European nations were happy to meet Smiths, Cartiers, O'Haras, Schultzes, di Salvos, Cohens, and Sklodowskas and all the others in our armies. Each nation could share in our victories because its "sons" had helped win them. How much of this good feeling was dissipated when they found virulent prejudice among some of our troops is impossible to say.

We cannot escape the fact that our civil rights record has been an issue in world politics. The world's press and radio are full of it. This Committee has seen a multitude of samples. We and our friends have been, and are, stressing our achievements. Those with competing philosophies have stressed—and are shamelessly distorting—our shortcomings. They have not only tried to create hostility toward us among specific nations, races, and religious groups. They have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of underprivileged people. This may seem ludicrous to Americans, but it is sufficiently important to worry our friends. The following United Press dispatch from London proves that (*Washington Post*, May 25, 1947):

> Although the Foreign Office reserved comment on recent lynch activities in the Carolinas, British diplomatic circles said privately today that they have played into the hands of Communist propagandists in Europe • • •.
>
> Diplomatic circles said the two incidents of mob violence would provide excellent propaganda ammunition for Communist agents who have been decrying America's brand of "freedom" and "democracy."
>
> News of the North Carolina kidnaping was prominently displayed by London papers • • •.

The international reason for acting to secure our civil rights now is not to win the approval of our totalitarian critics. We would not expect it if our record were spotless; to them our civil rights record is only a convenient weapon with which to attack us. Certainly we would like to deprive them of that weapon. But we are more concerned with the good opinion of the peoples of the world. Our achievements in building and maintaining a state dedicated to the fundamentals of freedom have already served as a guide for those seeking the best road from chaos to liberty and prosperity. But it is not indelibly written that democracy will encompass the world. We are convinced that our way of life—the free way of life—holds a promise of hope for all people. We have what is perhaps the greatest responsibility ever placed upon a people to keep this promise alive. Only still greater achievements will do it.

The United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record."

ARGUMENT AND POINT

The judicial enforcement of the restrictive covenant violates the treaty obligations of the United States (R. 71).

The Fourteenth Amendment to the Federal Constitution, Sec. 1, reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall *make* or *enforce* any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive* any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

In 1945 the Ontario High Court gave judicial life to the anti-discrimination provisions of the San Francisco Charter,

the Atlantic Charter, the Act of Chapultepec, and the Charter of the United Nations, in holding, *In Re Drummond Wren*, 4 D. L. R. 674, that a restriction against the use of land by members of racial minorities is contrary to the public policy of Canada because that country has dedicated itself, by adherence to the stated international treaties, to promote respect for and observe human rights and fundamental freedoms.

Taking into account the treaties and the public utterances of statesmen, the court held that such restrictions were void, and said:

> "How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently-enacted Racial Discrimination Act, and the judicial branch of government must take full cognizance of such factors.
>
> "Ontario, and Canada too, may well be termed a province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have by their

actions over the years, obviated the need for rigid constitutional guarantees in our policy by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

"That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-semitism has been a weapon in the hands of our recently-defeated enemies, and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

"My conclusion therefore is that the covenant is void because offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate."

The demonstrable consequences of such restrictions will be fully developed in the briefs of the parties. But it is useful to explore very briefly how our courts have in the past viewed such obligations, only for the purpose of evaluating the problem against the obligations we assume as charter members of the United Nations.

A controversy has raged over whether *Corrigan* v. *Buckley*, 1926, 271 U. S. 323, is controlling in support of

such restrictions and some have persuasively argued that the dictum in the *Corrigan* case is not a precedent upholding the enforcement of restrictive covenants; that such an issue was never fully decided by the Supreme Court. (Cf. Dissenting Op. by Mr. Justice Edgerton, in *Hurd* v. *Hodge*, No. 9196, U. S. Ct. of Appeals, Dist. of Columbia, May 26, 1947, cert. granted, 92 L. ed. 34).

In *Buchanan* v. *Warley*, 245 U. S. 60, this court was asked to evaluate a city ordinance, in the State of Kentucky, which forbade any white or Negro person from moving into a block in which one or the other race already occupied a majority of the dwellings. Notwithstanding the seeming reciprocity of this legislation, this court struck it down as an unconstitutional qualification of the right to acquire or occupy property, on the basis of color.

It is clear from the briefs of the parties that both legislative action and legislative sanction of private action are unconstitutional and void, as irreconcilable with the 14th Amendment. (Cf. *Harmon* v. *Tyler*, 273 U. S. 668; *Richmond* v. *Deans*, 281 U. S. 704.)

Restriction has, however, been sustained on the theory that it is the result of private covenant. This device seems doomed to exposure and annihilation because the distinction between legislative action and judicial enforcement of private agreements, as a variant from state action, is untenable, for it is a variant of and not from state action.

Judicial enforcement of any agreement carries with it the sanction of the state. Reversing the highest court in the state of Missouri, this Court held in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, that the " * * * federal guarantee of due process extends to state action through the judicial as well as through the legislative, executive or administrative branch of government."

See also: *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 36.

"Judicial acts" within the meaning of the cases comprehends procedural as well as substantive remedies. (Cf.

Powell v. *Alabama*, 287 U. S. 45 (procedural rights), *Brinkerhoff-Faris Co.* v. *Hill, supra, Ex parte Virginia*, 100 U. S. 339 (substantive rights). "State action" also means the same thing for the due process clause of the Fifth Amendment as it does for the Fourteenth Amendment.

> "Validity of Anti-Negro Restrictive Covenants; a Reconsideration of the Problem", (Kahen, 12 U. of C. L. R. p. 198, 1945); "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional", (Prof. McGovney, 33 Cal. L. R. 5, 1945).

With this cursory glance at some of the authorities, we return to the question whether such covenants are to be denied enforcement by virtue of existing treaties to which the United States is a signatory.

Since *Corrigan* v. *Buckley, supra*, the United States of America has made two international treaties in which she pledged herself to abolish discrimination.

Article 6, clause 2 of the Constitution of the United States declares: "The Constitution and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land and the Judges in every state shall be bound thereby any Thing in the Constitution or Laws of any state to the contrary notwithstanding".

Thus, the Constitution provides that a treaty between the United States and another nation takes precedence over private covenants in conflict with treaty obligations. The policy of the United States, exemplified in its treaties, is by universally acknowledged principles of law, obligatory on every citizen of the United States. (*Kennett* v. *Chambers*, 14 How. 38.)

> "International law is part of our law and must be ascertained and administered by the courts of justice

> * * * as often as questions of right depending upon it are duly presented for their determination" (*Hilton* v. *Guyot*, 159 U. S. 113, 163).

In international law a treaty is defined as an agreement between two or more independent states, or as a league or contract between two or more sovereigns firmly signed by commissions properly authorized and solemnly ratified by the several sovereigns or the supreme power of each state. (*Webster*:—*Cherokee Nation* v. *Georgia*, 5 Pet. 60, 8 Lawyers' Ed. 25; *Edye* v. *Robertson*, 112 U. S. 580, 28 Lawyers' Ed. 798; *Holmes* v. *Jennison*, 14 Pet. 571, 10 Lawyers' Ed. 579; *U. S.* v. *Rauscher*, 119 U. S. 407, 30 Lawyers' Ed. 425; *ex parte Ortiz* (C. C.) 100 Fed. 962; *Charlton* v. *Kelly*, 57 Lawyers' Ed. 1274, 46 L. R. A. New Series 397).

"The courts of the United States lost no time in affirming the principle that international law is part of the law of the land. Before the end of the century, the last quarter of which saw the establishment of American independence and the adoption of the Constitution, Mr. Justice Wilson laid down the principle that 'when the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement.' (*Ware* vs. *Hylton*, 3 *Dallas*, 199, 1 L. Ed., 568.) This was followed by a declaration of Chief Justice Marshall, in 1804, that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. (*The Charming Betsy*, 2 Cranch, 64, 2 L. Ed., 208.) Later, in 1815, the Chief Justice reaffirmed this position and held that until an act of Congress has been passed "the court is bound by the law of nations, which is a part of the law of the land." (*The Nereide*, 9 Cranch, 388, 3 L. Ed., 769.)

"The position proclaimed so early in the history of the Supreme Court this tribunal has consistently maintained. Indeed, in some instances it has chosen to adopt language even stronger than that of John Marshall. Thus in 1895, speaking for the court, Mr. Justice Gray holds that interna-

tional law, in its widest and most comprehensive sense, is a part of the law of the land, and must be ascertained and administered by the courts of justice as often as questions involving international law are presented in litigation between man and man and duly submitted for the decision of the courts. The justice emphasizes that he has in mind not only questions of right between nations when he speaks of international law, but questions of what international jurists call private international law, or the conflict of laws, as it is otherwise frequently called, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominion of another nation. (*Hilton* vs. *Guyot*, 159 U. S., 677, 40 L. Ed., 95.) In a still later case, and one which has become a leading decision in the latter-day history of international law, it is again Mr. Justice Gray who holds that 'international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.' (*The 'Paquette Habana,'* 175 U. S., 677, 44 L. Ed., 320; *The Lusitania*, 251 Fed. Rep., 715.) In administering this law the court does not consider itself 'at liberty to inquire what is for the particular advantage or disadvantage of our own or another country'." (*The Peterhoff*, 5 Wallace, 28, 18 L. Ed., 564.)

Enforcement of international law by the courts, whenever proper and possible, undoubtedly makes for progress in orderly international relations, but, from the point of view of the practicing lawyer, it has also the important and practical result that the law of nations, unlike foreign municipal law, does not have to be proved as a fact and is taken judicial notice of by the courts. (*The Scotia*, 14 Wallace, 170, 20 L. Ed., 822; *The New York*, 175 U. S., 187, 44 L. Ed., 126.)—("Judicial Interpretation of International Law in the United States"—Pergler—pp. 8, 9, 10.)

See also *United States* vs. *Thompson*, 257 U. S., 432, 66 L. Ed., 299. Mr. Justice Holmes declares in this opinion

that "there is no mystic over law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law, that is only a short way of saying that, for this purpose, the sovereign power takes up a rule suggested from without, and makes it part of its own rules."—("Judicial Interpretation of International Law in the United States"—Pergler—p. 16.)

On March 6, 1945 the United States, acting through its commissioners, formally signed a treaty (later solemnly ratified by the United States Senate) with the Latin-American nations, known as the Act of Chapultepec, which provided, among other things, that the signatories would "• • • *prevent with all the means within their power all that may provoke discrimination among individuals because of racial and religious reasons*". (Emphasis supplied).

Article 55, subd. c. of the Charter of the United Nations, dealing with international economic and social cooperation, provides that "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples the United Nations shall promote: • • •

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion".

The objections under "c." were taken over from the Dumbarton Oaks proposals with two changes. One was the addition of the words "for all without distinction as to race, sex, language or religion", which had the effect of defining more explicitly the application of the principle. The other change consisted of the inclusion of the words "and observance of", by which it was obviously intended to translate the principle into practice by requiring its actual observance.

Article 56 of the Charter of the United Nations specifically implements the declaration of principles found in article 55 in these words: "All members pledge themselves

to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in article 55."

In discussing these sections, Leland M. Goodrich and Edvard Hambro (Charter of the United Nations, Commentary and Documents) say in part as follows, (p. 189, et seq.):

"The Dumbarton Oaks proposals contained no such pledge. Apparently it was to be assumed that the commitment of the organization contained in the statement of purposes was enough. Some of the governments represented at San Francisco felt, however, that a more specific commitment was necessary to reinforce the statement of purposes and to make it clear that the members obligated themselves to take individually the action necessary to make the cooperation effective. (The history of this section is important for it discloses an intent on the part of each signatory to be bound by the commitment). The original text proposed by the drafting subcommittee of Committee II/3 read as follows: "All members pledge themselves to take separate and joint action and to cooperate with the organization and with each other to achieve these purposes". (Summary report of 12th meeting of Committee II/3, May 26, 1945, doc. 599, II/3/31, p. 1). (Matter in parenthesis, supplied).

"The United States delegate reserved her position on the question of phraseology, and the matter was referred back to the subcommittee for reconsideration. The subcommittee then recommended the following phraseology: "All members undertake to cooperate jointly and severally with the organization for the achievement of these purposes". (Summary report of the 14th meeting of Committee II/3, May 29, 1945, doc. 684, II/3/38, p. 4): "Several delegates still objected to this phraseology on the ground that it did not contain the three-fold pledge which the Committee had in principle approved, i.e., the pledge to take separate action, to take joint action, and to cooperate with

the organization." (Summary report of the 15th meeting Committee II/3, May 30, 1945, doc. 699, II/3/40, p. 123, inc.) "It was voted to refer the matter back a second time to the drafting subcommittee. The phraseology which the subcommittee recommended the third time was found acceptable." (Summary report of 17th meeting of Committee II/3, June 1, 1945, doc. 747, II/3/46, p. 1).

"From this abbreviated account of the history of the article, it is clear that two opposing points of view were proposed at San Francisco. One was that each member should pledge himself to take independent, separate national action to achieve the purposes set forth in article 55. This was the view of the Australian Delegation, for example, and found expression in a proposed amendment, which perhaps was the original inspiration of this Article.

"On the other hand, there was the view that such a pledge of separate national action went beyond the proper scope of the Charter, which was concerned with encouraging international cooperation and perhaps even infringed upon the domestic jurisdiction of Member States. This apparently was the view of the American Delegation.

"The phraseology officially agreed to was a compromise, and like most compromises, was capable of more than one interpretation. . ."

However, this much is clear: The members pledged themselves to take separate action to achieve the purposes of Article 55, and although this separate action was presumably to be taken in cooperation with the organization for the achievement of the purposes set forth in article 55, it had to include domestic action to assume any significance whatever.

Legally speaking, therefore, this seems to be the right time to find out if the United Nations means anything. If it means anything, the Supreme Court now has a rare opportunity to translate into action the meaning of the provisions of the Charter which the member nations pledged

themselves to carry out. It is quite easy to talk of democracy and of our devotion to its principles, particularly when we happen to be looking for benefits for ourselves, but this is not enough. We talk of equal justice under law, but this is not enough because talk is not enough. We talk of rights conferred by the United Nations Charter, but this is not enough, unless the rights are translated into reality. Segregation is not democracy and the parochial sovereignty of a segregation-minded property owner is not democracy. Lincoln once said: "As I would not be a slave, so I would not be a master. This expresses my idea of democracy. Whatever differs from this to the extent of the difference is no democracy". So say the United Nations and they are up to date.

A movement called "Common Cause" recently pointed out that "Democracy means equality . . . recognizes no races, castes or orders commissioned by God or qualified by their own attributes to exploit, govern or enslave their fellow human beings.

"Democracy means rule of law: . . . all individuals and minorities should be protected in their rights and liberties against the passion of mobs, the vengeance of party, the power of privilege, the tyranny of policy, the caprice of officials, the ambitions of madmen and the arbitrary invasions of government."

Respectfully Submitted,

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